

212572

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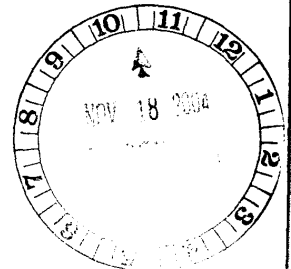
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November 17, 2004

Re: STB Finance Docket No. 34486 – Ohio Valley Railroad Company – Acquisition and  
Operation Exemption – Harwood Properties, Inc.

Hon. Vernon A. Williams  
Secretary, Surface Transportation Board  
Mercury Bldg., #711  
1925 K Street, N.W.  
Washington, D.C. 20423-0001



Dear Sir:

Enclosed for filing please find the original and ten copies of the Reply of Ohio Valley Railroad Company to Indiana Southwestern Railway Company's Motion to Strike. Copies of this Reply have been served on all parties of record.

Please date stamp and return a copy of this letter in the enclosed self addressed, stamped envelope to indicate the Board's receipt of this Reply.

Very truly yours,

VUONO & GRAY, LLC

Richard R. Wilson, Esq.  
Attorney for Ohio Valley Railroad Co.

ENTERED  
Office of Proceedings

NOV 18 2004

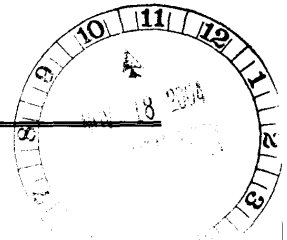
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RRW/bab  
Enclosures

xc: David Konschnik, Director – Office of Proceedings  
All Parties of Record

212572

BEFORE THE SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34486

OHIO VALLEY RAILROAD COMPANY

-ACQUISITION AND OPERATION EXEMPTION-

HARWOOD PROPERTIES, INC.

REPLY OF OHIO VALLEY RAILROAD COMPANY TO  
INDIANA SOUTHWESTERN RAILWAY COMPANY'S  
MOTION TO STRIKE

ENTERED  
Office of Proceedings

NOV 18 2004

Part of  
Public Record

Richard R. Wilson, Esq.  
Vuono & Gray, LLC  
2310 Grant Building  
Pittsburgh, PA 15219  
412-471-1800  
Attorney for Ohio Valley Railroad

Dated: November 17, 2004

BEFORE THE SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 34486

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**OHIO VALLEY RAILROAD COMPANY  
-ACQUISITION AND OPERATION EXEMPTION-  
HARWOOD PROPERTIES, INC.**

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**REPLY OF OHIO VALLEY RAILROAD COMPANY TO  
INDIANA SOUTHWESTERN RAILWAY COMPANY'S  
MOTION TO STRIKE**

Ohio Valley Railroad Company ("OVR") hereby files this Reply to the November 11, 2004 Motion of Indiana Southwestern Railway Company ("ISW") to Strike and in support thereof states as follows:

The Commissions Rules of Practice at 49 C.F.R. §1104.13 provide that "a party may file a reply or motion addressed to any pleading within twenty (20) days after the pleading is filed with the Board, unless otherwise provided." The Board's rules also provide that a reply to a reply is not permitted. Nothing in the Board's rules state that a reply must respond only to allegations made in the filing to which it is directed. A responsive pleading may always raise pertinent new matters which are not addressed in the Motion to which it responds.

The Reply filed on behalf of OVR to ISW's Motion to Reconsider addressed not only the various allegations contained in ISW's Motion to Reconsider, it also addressed related actions taken by ISW which provide a commercial context and record so that the

Board may properly evaluate the actions and motivations of ISW in seeking reconsideration of OVR's Notice of Exemption.

The example cited by ISW with respect to the intermediate switch charge for locomotive and passenger cars provides a case in point.<sup>1</sup> Mid-America repairs locomotives and passenger cars as well as other kinds of rail cars. OVR attached a copy of ISW's tariff publication to its Reply so that the Board could examine those documents for itself and be aware of ISW's commercial activities and assess the impact of those activities on OVR's efforts to enter the rail transportation marketplace and serve existing and future shippers at Harwood Yard.<sup>2</sup>

Similarly, the documents submitted by OVR in its Reply establish that Evansville Terminal Corporation granted direct CSXT interchange rights to OVR's predecessors in interest long before ISW even acquired its current rail line. Moreover, at any time those interchange rights could have been utilized by CSX Transportation, Inc., a common carrier by railroad, had OVR's predecessors in interest and CSXT agreed to do so.

Finally, OVR's contention that ISW's Motion to Reconsider was a response to OVR's Petition for Emergency Service in Finance Docket 34608 is a perfectly plausible conclusion to draw from the facts of this proceeding. ISW filed a Petition to Revoke OVR's Notice of Exemption and pending the Board's decision, OVR proceeded to make

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<sup>1</sup> In this proceeding, OVR is not seeking any adjudication or relief from ISW rates which ISW publishes in its common carrier switch tariff.

<sup>2</sup> Counsel for ISW is incorrect in his assertion that locomotives and passenger charges are not common carrier movements. That is true only for locomotives or cars owned or used by common carrier railroads which are instrumentalities of transportation entitled to free moves under industry car service rules. That it is not the case for locomotives and passenger cars not used in common carrier rail service which are considered to be property or freight described as "equipment moving on its own wheels." Cf. Missouri Pacific RR Co. and Consolidated Rail Corp. – Petition for Declaratory Order – Recovery of Transportation Charges, 1988 Lexis 321 (1988). This is a well established category of rail traffic in the Uniform Freight Classification and is subject to common carrier tariff rates. Gen. Am. Transp. Corp. v. IHBRR, 3 ICC2d 599 (1987) aff'd Gen Am. Transp. Corp. v. ICC, 872 F2d 1048 (DC Cir 1989)

arrangements through the AAR and related organizations to obtain reporting marks and under take other steps to commence common carrier rail operations. The Board denied the ISW Petition on September 24, 2004. As OVR was about to initiate discussions with ISW for interchange facilities, ISW, on October 16, 2004, tore out the two switch connections between its rail facilities and the rail facilities of OVR even though the Board had denied ISW's petition to revoke OVR's Notice of Exemption. Indeed, OVR believes that the ISW Motion for Reconsideration was filed after ISW removed its switches solely to provide a legal pretext for its illegal conduct. If ISW had been truly concerned about the absence of an interchange agreement, reporting marks or safety issues, it could have simply kept its switches locked, notified OVR of its concerns and resolved those issues with OVR. Rather, ISW's removal of its connecting switches is intended to prevent OVR from providing common carrier rail service under its Notice of Exemption. ISW's true intentions maybe readily be inferred given the total absence of any circumstances warranting the Board's reconsideration of its denial of ISW's revocation petition.

ISW has stated no legitimate reason for its Motion to Strike and is using its Motion to Strike as a prohibited reply to a reply, a pleading tactic with which the Board is all too familiar. ISW's abuse of the Board's Rules of Practice should not be accommodated and its Motion to Strike should be denied.

Respectfully submitted,

VUONO & GRAY, LLC

By:



Richard R. Wilson, Esq.  
Attorney for Ohio Valley Railroad  
Company

VERIFICATION

I, William Gray, President of Ohio Valley Railroad Company, verify under penalty of perjury state that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Petition

Executed on Nov 17, 2004.

  
William Gray

CERTIFICATE OF SERVICE

Richard R. Wilson, Esq., attorney for Ohio Valley Railroad Company hereby certifies that on the 17<sup>th</sup> day of November, 2004, he did serve a true and correct copy of the foregoing Reply to ISW's Motion for Extension of Time upon the following counsel of record, by first class mail, postage prepaid, at their offices as set forth below:

Louis E. Gitomer, Esq.  
Ball Janik, LLP  
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Indiana Southwestern Railway Co.  
1318 S. Johanson Road  
Peoria, IL 61607

  
Richard R. Wilson, Esq.